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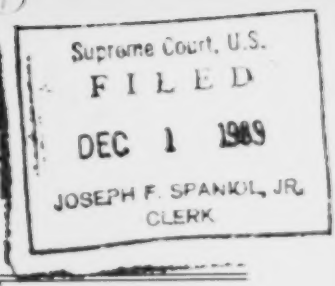


No.

# In the Supreme Court of the United States

October Term, 1989

CLARKE COUNTY SCHOOL DISTRICT,
*Petitioner,*

vs.

IN RE: DREW P. by next friend,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ERWIN, EPTING, GIBSON & MCLEOD
ANDREW H. MARSHALL
(Counsel of Record)
P. O. Box 8108
Athens, Georgia 30603
(404) 549-9400
*Attorney for Petitioner*

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

68 1P

## QUESTION PRESENTED

May federal courts require reimbursement from a school district of sums expended by parents of handicapped child on private educational placement unilaterally selected by them when such placement fails to meet the standards of the State educational agency as required by the provisions of the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.*

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# In the Supreme Court of the United States

**October Term, 1989**

CLARKE COUNTY SCHOOL DISTRICT,
*Petitioner,*

vs.

IN RE: DREW P. by next friend,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

I.

## OPINIONS BELOW

The principal opinion of the United States District Court for the Middle District of Georgia is reported as *In Re: Drew P. By Next Friend v. Clarke County School District*, 676 F. Supp. 1559 (M.D. Ga. 1987). A supplemental order was filed on February 18, 1988, authorizing recovery of expenses associated with private educational placements and attorney fees. The decisions of the District Court were affirmed by the United States Court of Appeals for the Eleventh Circuit, 877 F. 2d 927 (11th Cir. 1989). The Court of Appeals denied Petitioner's Motion for Rehearing and Suggestion of Rehearing In Banc. The decisions of the District Court, the opinion of the Eleventh Circuit, and the order denying the application for rehearing and rehearing in banc are contained in the appendix.

## II.

## JURISDICTION

The Petitioner's application for rehearing and suggestion of rehearing in banc was denied by the Court of Appeals on October 3, 1989. This petition for the writ of certiorari was filed within sixty days of the denial of the application for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## III.

## STATUTORY PROVISIONS INVOLVED

20 U.S.C. §1401(a)(1): "As used in this chapter—The term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech or language inpaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other help impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services."

20 U.S.C. §1401(a)(6): "The term 'state' means any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands."

20 U.S.C. §1401(a)(7): "The term 'State educational agency' means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or State law."

20 U.S.C. §1401(a)(8): "The term 'local educational agency' means a public board of education or other public

authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school."

20 U.S.C. §1401(a)(16): "The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."

20 U.S.C. §1401(a)(17): "The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except as such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

20 U.S.C. §1401(a)(18): "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) includes an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized

education program required under section 1414(a)(5) of this title."

20 U.S.C. §1401(a)(19): "The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular education programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instruction objectives are being achieved."

20 U.S.C. §1415(e)(3): "During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . ."

## IV.

## STATEMENT OF THE CASE

This civil action was commenced by Plaintiff Drew P. through his parents and next friends, pursuant to the Education of the Handicapped Act (EHA or the "Act"), as amended, 20 U.S.C. §§1401 *et seq.* The jurisdiction of the District Court was invoked pursuant to 20 U.S.C. §1415(e)(2). The complaint alleged that Petitioner Clarke County School District (CCSD) had failed to provide Drew with a free appropriate education under the provisions of the Act and requested that an order be entered requiring Drew's placement in a residential care facility for autistic children. Additionally, the complaint sought reimbursement for expenses incurred in placing Drew in private residential facilities. No complaint was made about procedural matters; rather, Drew's complaint involved substantive questions relating to his individualized educational program ("IEP").

As part of the record in this case, the transcript and other records of the administrative proceedings were filed. Among other items, the administrative record contained the conclusion of the Regional Hearing Officer that Drew had been provided with an appropriate special education program by CCSD and that his placement in a private facility was not appropriate. Consequently, the Regional Hearing Officer concluded that CCSD was not required to reimburse Drew's parents for the cost of the private placement which was at issue at that time. This decision was sustained on appeal to the State Hearing Officer.

On September 22, 1987, the case came on for non-jury trial before the Honorable Duross Fitzpatrick, United States District Judge for the Middle District of Georgia. Following a post-trial telephonic deposition initiated by the court, an order was entered on December 23, 1987, con-

cluding that CCSD had deprived Drew of a free appropriate education by refusing to place him in a residential treatment facility. The court directed CCSD to implement an IEP placing Drew in an appropriate residential facility for autistic children until he reached age 21 and further held that Drew's parents were justified in removing him from the CCSD education program and placing him in a residential facility thereby entitling them to reimbursement for the expense of the placement.

Following a supplemental hearing, an order was entered on February 18, 1988, requiring CCSD to reimburse Plaintiff for tuition and related expenses in the amount of $42,637.00 and further holding the Plaintiff was entitled to attorney's fees in the amount of $8,500.00. The trial court's judgment was affirmed on appeal by the United States Court of Appeals for the Eleventh Circuit.

During the 1984-85 school year, an IEP was developed with the participation of both of Drew's parents and which noted the tremendous progress which Drew had made in all areas of the school program and which particularly noted the increased and positive interaction with peers. Drew's mother, Judy Prince, is a special education teacher employed by CCSD, and she signed each page of the 1984-85 IEP and made no written or verbal objection to the IEP or to the proposed placement for her son. The head of the Clarke County Special Education Program had regular contacts with Mrs. Prince and testified without dispute that at no time did she indicate any dissatisfaction with Drew's placement during the 1984-85 school year.

Nevertheless, in January, 1985, Drew was unilaterally withdrawn from the CCSD Special Education Program and was enrolled in Parkwood Development Center in Valdosta, Georgia. At the end of the 1984-85 school year, Drew was removed from the Parkwood facility and was placed at the

Musashino Higashi Facility in Tokyo, Japan, starting in September of 1985. Drew returned to his home for five to six weeks during the summer of 1986 and returned to Japan at the beginning of the 1986-87 school year. He remained at the Musashino facility in Tokyo until August, 1987, and after another summer break, was placed in the Musashino facility in Boston, Massachusetts, for the 1987-88 school year.

In connection with Drew's initial placement at the Tokyo facility in September, 1985, Mrs. Prince spent a week at that facility. She also spent a weekend at the facility in February, 1986, but had no other opportunities for first hand observations of Drew at the Tokyo facility during the 1985-86 or 1986-87 school years. Other than the limited personal observations of the Tokyo placements which were the subject of testimony by Mrs. Prince, the only evidence pertaining to this placement consisted of records which were identified as Plaintiff Exhibit 1 and which were admitted over CCSD's timely objections as to hearsay and authenticity.

No evidence was offered by Plaintiff that the placement at the Musashino facility was in accordance with the standards of the responsible state educational agency, and no evidence was offered sufficient to justify a conclusion that the services offered at those placements conformed to the individualized education program requirements of 20 U.S.C. §§1401(a)(19), 1414(a)(5).

## V.

## REASONS FOR GRANTING THE WRIT

**THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT REQUIRING REIMBURSEMENT FOR SUMS EXPENDED BY PARENTS OF A HANDICAPPED CHILD ON PRIVATE EDUCATIONAL PLACEMENT UNILATERALLY SELECTED BY THEM WHEN SUCH PLACEMENT FAILED TO MEET THE STANDARDS OF THE STATE EDUCATION AGENCY IS NOT AUTHORIZED BY THE ACT AND IS IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.**

Without question, the most important decision on tuition reimbursement under the Act is *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). For the purpose of the issue under consideration, it is unnecessary to describe in minute detail the somewhat convoluted facts in *Burlington*. It is sufficient to note that the parents of the handicapped child took issue with a proposed IEP developed by the local educational agency as the result of which the child was unilaterally removed from the school system and placed at a private facility. The primary question litigated in the United States District Court was the responsibility for payment of the private school expenses and by the time the matter was adjudicated on the merits, there were at least three school years which were in issue. This Court granted certiorari to address the issues of whether the potential relief available under the EHA includes reimbursement to parents for private school tuition and related expenses and whether the "stay put" provisions of 20 U.S.C. §1415(e)(3) barred reimbursement when the child was unilaterally removed from the school system and privately placed.

After *Burlington*, it cannot be seriously argued that reimbursement of parents for sums spent on private special education is not authorized under the EHA. Moreover, the court squarely held that the unilateral placement by the parents at a private facility during the course of review proceedings did not constitute a *per se* waiver of the right to claim reimbursement.

On the other hand, this Court made it abundantly clear that reimbursement of parents was authorized under the circumstances only if ". . . the court ultimately determines that such [unilaterally selected private] placement rather than a proposed IEP, is proper *under the Act*. 471 U.S. at 369 (emphasis supplied).

While the court ruled that the "stay put" provisions of 20 U.S.C. §1415(e)(3) would not authorize a court to require parents to leave their child in a particular placement, 471 U.S. at 373, and that the unilateral change would not constitute a waiver of the right to reimbursement, the court made clear that such decisions were at the financial risk of the parents. 471 U.S. at 374. The conclusion is thus inescapable that under the circumstances described in *Burlington* as well as under the circumstances of this case, the parents were obligated to prove *both* that the IEP calling for placement in the public school system was inappropriate *and* that the unilaterally selected private placement was proper *under the Act* in order to be entitled to reimbursement.

The threshold requirements of what is proper "under the Act" are spelled out in 20 U.S.C. §1401(a)(18) which includes the requirement that the special education and related services: "(B) meet the standards as of the State educational agency. . ." In this case, the parents of Drew P. did not address much less prove that the services at the Musashino facilities met the standards of the State educa-

tional agency. Although the controlling law required a determination that the Musashino placements were "appropriate" under the EHA as the *sine qua non* of the remedy of reimbursement under *Burlington*, the trial court simply ignored and the Eleventh Circuit apparently excused this deficiency in Plaintiff's proof, relying not upon any facts of record but to statements made in the appellate brief of respondent that the State of Georgia did not recognize autism as a discrete and separate disorder and had therefore failed to establish standards for the treatment of autistic children. 877 F. 2d at 931.

The only decision cited by the trial court and by the Eleventh Circuit to justify the order of reimbursement for placement at a non-approved facility was *Jenkins v. Florida*, 815 F. 2d 629 (11th Cir. 1987). In that case, the court in a *per curiam* decision vacated the judgment of the District Court denying reimbursement which was made prior to this Court's decision in *Burlington* and remanded for further proceedings. While the court held in *Jenkins* that the issue of reimbursement should be determined by balancing the equities, it is submitted that the Eleventh Circuit could not properly decide that reimbursement issues could and should be resolved by nothing more than a particular judge's perception of the equities of the case. Properly understood, the references to the balancing of equitable factors in both *Burlington* and *Jenkins* mean that such considerations come into play in a reimbursement context only after a threshold determination is made that the public school placement is inappropriate and that the unilaterally selected private placement is appropriate "under the Act". To hold otherwise means that trial courts are free to disregard the conditions that Congress placed on funds it appropriated for the education of handicapped children based upon nothing more than subjective notions of fairness. Such an interpretation of the law flies in the

face of principled decision-making and ignores the requirements of *Burlington* and the EHA.

It is respectfully submitted that the appropriate analysis of the issue under consideration was made in three decisions of other courts of appeal which are in direct conflict with the Eleventh Circuit on the issue. In *Schimmell v. Spillane*, 819 F. 2d 477 (4th Cir. 1987) the parents unilaterally selected a private residential placement for their handicapped child which was not approved by the Virginia Department of Education. After unsuccessful attempts to obtain reimbursement from the local system through administrative proceedings, a federal lawsuit was filed. In affirming the entry of judgment for the local school system, the Fourth Circuit noted that the State has an obligation under the EHA to ensure that private schools in which handicapped children are placed meet the standards of the State educational agency. Because Plaintiff failed to prove that the residential placement selected by the parents met the standards of the state agency, the court held that the school system was under no obligation to reimburse the parents for tuition and related expense. Indeed, the court indicated that EHA funding of an unapproved private placement would not be authorized by the local agency even if it was otherwise inclined to pay for such placement.

In *Antkowiak v. Ambach*, 838 F. 2d 635 (2nd Cir.), *cert. denied*, ____ U.S. ____, 109 S. Ct. 133 (1988), the parents of a handicapped child filed suit against the head of the State educational agency seeking an order requiring approval of a particular residential placement. The placement in question was not only requested by the parents but had also been recommended by the local educational agency. The hearing officer ordered that the child be placed at the requested facility, and the trial court also determined that

the placement was a suitable one, rejecting the contention that it was not approved by the State educational agency. The Court of Appeals for the Second Circuit reversed the judgment for Plaintiff and remanded for entry of judgment in favor of the Defendant. In doing so, the court clearly and unequivocally held that ". . . under the EHA, neither the hearing officer nor the district court could order Lara's placement in an unapproved school. 838 F. 2d at 639.

Admittedly, the Second Circuit's decision in *Antkowiak* involved the issue of whether a school district could place a handicapped child in an unapproved school or be ordered by the court to do so. However, the Second Circuit was presented with what is fundamentally the same issue in a reimbursement context in the case of *Tucker v. Bay Shore Union Free School District*, 873 F. 2d 563 (2nd Cir. 1989). Affirming the dismissal of the complaint, the court held that the parents could not obtain reimbursement for unilateral placement of a child in a school which was not approved by the responsible State educational agency. Reimbursement of expenses incurred for placing a child in an unapproved school could not be considered "proper under the Act" because it would violate the Acts requirement that placements "meet the standards of the State educational agency" pursuant to 20 U.S.C. §1401(18)(b). 873 F. 2d at 568.

The decision of the Eleventh Circuit on this important issue under the Act is not only in direct conflict with the previously cited decisions of the Second and Fourth Circuits and with the EHA but also significantly alters the elaborate statutory scheme enacted by Congress to address the issue of special education for handicapped children. It is noteworthy that under the Act, it is contemplated that parents and school systems will jointly participate in the formulation of the IEP and where disagreements exist which cannot be voluntarily resolved,

such disputes are addressed in the first instance at an impartial due process hearing. 20 U.S.C. §1415(b)(2). These and other procedural safeguards embodied at 20 U.S.C. §1415 were considered to be of at least equal importance with a substantive standard of education by this court in *Board of Education v. Rowley,* 458 U.S. 176, 206 (1982). In practical terms, the decision of the Eleventh Circuit means that the standards of the State educational agency in a reimbursement context may be ignored by the court (and by implication by the administrative hearing officer) so long as the private placement conforms to the decision-maker's evaluation of the equities of the case. Thus, the decision upsets the allocation of responsibilities among the federal government, the State and local educational agencies, the administrative hearing officers, and the courts. Moreover, it is inevitable that the process of developing the IEP between parents and school systems will be affected and indeed impeded by injecting the unpredictable factor of the decision-maker's view of the equities of the case. These considerations along with the fact that the Eleventh Circuit decision is in conflict with the decisions of two other courts of appeal present compelling reasons why the writ of certiorari should be granted.

## VI.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case should be granted and the decision below reversed by this Court.

Respectfully submitted,

ERWIN, EPTING, GIBSON & MCLEOD
By: ANDREW H. MARSHALL
*Attorney for Petitioner*

P. O. Box 8108
Athens, Georgia 30603
(404) 549-9400

# APPENDIX

(Filed December 23, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF GEORGIA
ATHENS DIVISION

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CIVIL ACTION NO. 85-119-ATH

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IN RE: DREW P. By Next Friend,
Plaintiff,

vs.

CLARKE COUNTY SCHOOL DISTRICT,
Defendant.

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FITZPATRICK, District Judge

Plaintiff Drew P., through his parents and next friends, brought the above-referenced action under the Education for All Handicapped Children Act (EHCA or the Act), as amended, 20 U.S.C. 1401 *et seq.*, section 504 of the Rehabilitation Act of 1973 (section 504), as amended, 29 U.S.C. § 794, and 42 U.S.C. § 1983. Plaintiffs contend that Defendant School Board failed to provide Drew P. a free appropriate public education as required by federal law. All state administrative remedies had been exhausted prior to the filing of this action. The court's jurisdiction is invoked pursuant to 20 U.S.C. § 1415(e)(2), 29 U.S.C. § 794, 42 U.S.C. § 1983, and 28 U.S.C. § 1343(4).

The case was heard by the court sitting without a jury on September 22, 1987. As they did at the administrative level, Plaintiffs' seek residential placement[1] for Drew whose educational needs, they contend, cannot be met by the current programs available in the Clarke County School District (CCSD). The two questions the court must decide are as follows: first, whether the CCSD deprived Drew of a free appropriate public education by refusing to place him in a twenty-four hour day residential treatment facility; and second, if the court finds that the CCSD did deprive Drew of an appropriate education, what remedy is available to Plaintiffs. The court's findings of fact and conclusions of law are set forth below.

## I. FINDINGS OF FACT

Drew is a 16 year-old multihandicapped child whose condition has been diagnosed as a combination of infantile autism and mental retardation. Individuals suffering from autism have been described as

> persons, regardless of age, with severe disorders of communication and behavior whose disability became manifest during the early developmental stages of childhood. "Austic Children" includes, but is not limited to, those afflicted with . . . [a] condition characterized by severe defects in language ability . . . and behavior and by a failure to relate appropriately to others. The autistic child appears to suffer primarily from profound central processing disorders,

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1. A residential facility provides shelter, food, special education, and related services twenty-four hours a day. Drew has been living in a residential facility since September, 1985, except for the weeks he was home during the summers of 1986 and 1987.

> i.e., a selective impairment of his cognitive and or perceptual functioning, the consequences of which are manifested by sensory-motor, cognitive, social and language development impediments which reduce the ability to understand, communicate, learn, and participate in social relationships.[2]

Specifically, autistic children exhibit certain behaviors, some of the more common ones being an impaired speech or lack of speech; peculiar body motions, such as incessant rocking or flapping the arms or hands; limpness in the fingers and hands; a lack of desire for affection evidenced by aloneness or withdrawal; gaze-aversion or "looking through" people; and an apparent insensitivity to pain.[3]

The evidence from the state administrative hearing and the trial indicates that throughout his lifetime, Drew has exhibited many behaviors that are characteristic of an autistic child. For example, Drew cannot speak and communicates primarily with limited sign language or by pointing to objects. Drew seems to be very distant in his relationships with people. In addition, he "toe walks" when he is under stress, flaps his hands when excited, and laughs inappropriately. Drew is fascinated by the spinning of mechanical things, has little comprehension of fear or when fear is appropriate, and has difficulty coping with changes in his routine and environment. The evidence also shows that Drew has become increasingly

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2. This definition of autism was issued by The National Society for Autistic Children (NSAC), as approved by the NSAC Professional Advisory Board, on January 18, 1975.

3. *See* Definition of Autism prepared by Ruth C. Sullivan, Ph.D. of the Autism Services Center. This definition is a composite of two officially published definitions of the NSAC and is closely followed by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.

aggressive at home, throws objects when angered, and cannot be left by himself for any significant period of time.

Drew was involved in special education programs offered by the CCSD from the time he was five years old until his parents removed him from the CCSD in January of 1985. While in the local school system, Drew spent much of his time in a classroom for the severely mentally retarded or the severely emotionally disturbed. During his second year in the CCSD, however, Drew was residentially placed at the Georgia Retardation Center and was taught by an individual who had training and experience in working with autistic children. This was the only year Drew was taught by someone trained in the area of autistic children, and Drew's mother, who is a learning disabilities teacher in the CCSD, testified at the hearing that this was the only year in which Drew showed educational progress. From September, 1978 through the spring of 1981, Drew's parents hired a young man, who was working at the Georgia Retardation Center, to live in the home and work with Drew on a daily basis both before and after school.

During 1984 Drew's parents became dissatisfied with the services being offered by the CCSD. The parents believed that Drew required residential placement in an autistic treatment center. Conversely, the officials of the CCSD believed that Drew was making progress in the local system, and that residential placement was therefore unnecessary. The officials did feel, however, that some change in Drew's educational program was needed. In the late summer of 1984, the CCSD began looking for a "foster-type" home in which to place Drew so that he could remain in the CCSD and in the community. After it became apparent that efforts to find such a home would

yield no satisfactory results, the CCSD suggested that an in-home trainer be provided for Drew at the expense of the Department of Human Resources (DHR). This service was to be provided by the DHR until funding was exhausted.

In the fall of 1984, Cheryl Jordan was hired by the DHR to provide the services of an in-home trainer for Drew. Jordan, who has a degree in special education, worked with Drew for two to three months. Jordan testified at trial that during the time she was with Drew, he was non-compliant, i.e., he could not be guided by verbal command, and he required constant supervision. Jordan further testified that Drew pulled at her clothes when he did not want to obey her instructions, and that she saw Drew pull at his teacher's clothes on several occasions.

Beginning in January of 1985, Drew's parents began searching for a residential placement facility for Drew. Drew's mother contacted the DHR to inquire into the possibility of placing Drew in the Parkwood Developmental Center in Valdosta, Georgia. Parkwood is a residential treatment facility for the mentally retarded. Near the end of January, 1985, Drew was placed in the Parkwood Center on a 30-day trial basis, and Dr. Margaret Hiers was contacted to conduct a thorough evaluation of Drew.

Dr. Hiers is a self-employed evaluator and educational consultant. She earned her Masters and Doctorate degrees in the field of Mental Retardation at the University of Georgia. Dr. Hiers was a public school teacher and a college professor for many years, and was the head of special education at Valdosta State College during the mid-1970s. Dr. Hiers has had several years of experience working with retarded children and with au-

tistic children, both in the United States and in foreign countries.

After conducting her evaluation of Drew, Dr. Hiers concluded that Drew was an autistic child who functions in the mentally retarded range, that he needed concentrated instruction for the remainder of his teen years, and that "the optimal or most appropriate placement is not Parkwood, but a residential center in which the major concentration either for the center as a whole, or for his wing or area of the center, is the instruction of autistic adolescents."[4] Although Dr. Hiers stated in her evaluation that a residential facility would be the "optimal or most appropriate placement," when questioned further about that statement, she testified as follows:

> When I said what I did, I said it that way deliberately, because I feel that Parkwood is an appropriate placement, but I don't think it is the optimal placement. But I do feel it's appropriate. I feel that the public school is only appropriate for the academic instruction. I do not feel it is appropriate for his total educational program. So, that's just my opinion. I put the "optimal" [in] because I did feel that I could say Parkwood - knowing what I knew about it and about his needs - that it was an appropriate placement, but I could not say it was the most appropriate or the optimal placement.[5]

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4. Letter from Dr. Margaret H. Hiers (March 13, 1985). Dr. Hier's letter was introduced as Plaintiffs' Exhibit 1 at the proceedings before the Regional Hearing Officer on April 12, 1985, and is included in the Administrative Hearing Transcript (AHT). In addition to the main hearing on April 12, 1985, the Regional Officer heard testimony in this case on June 14, 1985 and July 2, 1985. Transcripts from all three days are included in the AHT.

5. Proceedings before the Regional Hearing Officer, July 2, 1985, at pp. 74-75.

At least two experts testified at trial that autistic children benefit from "sameness" in their environment. In other words, autistic children can become disoriented if any change is made in their environment, and therefore, the educational progress of an autistic child can be enhanced if the child is placed in a program in which the child experiences the same routine, the same objects, and the same activities in an environment that remains unchanged from day to day. Dr. Heirs testified at the state administrative hearing that while an environment of "sameness" can be achieved only through residential placement, such an environment is not required during the entire educational life of an autistic child, and may be necessary for only a period of one or two years.[6] In testifying as to why she recommended residential placement for Drew in 1985, Dr. Hiers stated that for Drew "there needs to be for a period of time a comprehensive instructional pattern that absolutely will relate every part of his life to what he's learning if he's going to function in a sheltered workshop."[7]

Following Drew's stay at Parkwood, the parents continued to search for an appropriate residential facility. The record is unclear as to Drew's status from February through August of 1985, but in September of that year, Drew was admitted to the Musashino Higashi Gakuen School in Tokyo, Japan. The Tokyo School is a residential placement facility that works with a large number of both retarded and autistic children. Drew returned to his home in Athens, Georgia for five to six weeks in the summer of 1986 before beginning another year in

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6. Proceedings before the Regional Hearing Officer, July 2, 1985, at pp. 16-17 (testimony of Dr. Hiers).

7. Proceedings before the Regional Hearing Officer, July 2, 1985, at pp. 55-56 (testimony of Dr. Hiers).

Tokyo. The following year the Tokyo School started a sister school in Boston, Massachusetts, and after Drew's summer vacation of 1987, he returned to school in Boston. As of the date of trial, Drew was living at the residential treatment facility in Boston.

Drew's mother testified at trial that Drew had made significant progress since his placement in the Musashino Higashi program. She testified that Drew had a purpose in his movement and direction, possessed a heightened level of calmness, and had a much longer attention span than before he entered the Tokyo School. Drew's mother further testified that during the summer of 1987, for the first time, she was able to direct Drew completely by verbal commands. Although Drew's mother testified he had progressed, the school evaluations of Drew seemed to indicate that Drew actually had regressed in certain areas between March and July of 1987.

The undisputed testimony is that Drew's parents were of the opinion that Drew needed to be placed in a residential treatment facility for autistic children. The CCSD refused to place Drew in such a facility, and maintained that Drew was receiving an appropriate education in the local school system. Following Drew's brief stay at the Parkwood Center and before his placement in the Tokyo school, Drew's parents requested a hearing before a Regional Hearing Officer to determine the placement question. On April 12, 1985 a hearing was held. Following this hearing, the Regional Officer found that the CCSD was providing Drew a free and appropriate education as contemplated under the EHCA, that Drew did not require residential placement in a facility for autistic children, and that the CCSD would not be required to reimburse Drew's parents for any costs incurred

by them in placing Drew in a residential facility.[8] On appeal, the State Hearing Officer sustained the decision of the Regional Hearing Officer.[9] Following the final decision of the State Hearing Officer, Plaintiffs filed the present action in this court.

At the state administrative hearing and at trial, the CCSD relied heavily on the testimony of Drew's teachers that Drew was making substantial progress toward the goals established for him in his individualized education programs (IEP).[10] An IEP is a written statement for a handicapped child which includes a statement of the child's present level of educational performance, a statement of annual goals, a statement of the specific services to be provided to the child along with the projected dates for the initiation and duration of the special services, and a list of objective criteria that can be used to evaluate the child's progress toward the annual goals.[11] The purpose of the IEP is to develop a plan of education that is appropriate to meet the particular needs of the handicapped child.

The IEPs developed for Drew during the years 1982 through 1985 indicated that Drew was making some progress in the special programs provided by the CCSD. In fact, on the May 12, 1983 IEP, Drew's teacher stated

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8. Decision of Colquitt P. Brackett Jr., Regional Hearing Officer, July 27, 1985. A copy of this decision is included in the AHT.

9. Decision of L. O. Buckland, State Hearing Officer, in *Drew P. v. Clarke County Bd. of Educ.*, Case No. 1985-28. A copy of this decision is included in the AHT.

10. Under the EHCA the parents of the handicapped child meet with educational authorities to develop an IEP for the child. 20 U.S.C. § 1401(19). The parents can later challenge the appropriateness of the IEP. *See* 20 U.S.C. § 1415(b), (c).

11. 20 U.S.C. § 1401(19).

that Drew had progressed "significantly" in the areas of interaction with peers, communication, and fine motor development. CCSD also relied on the fact that Drew's parents helped develop the IEP for the 1984-85 school year and made no objection to the goals set forth in the IEP or the proposed placement for Drew.

Although Drew's teacher stated on the May 12, 1983 IEP that Drew had made "significant" progress, it appears that Drew was working on many of the same things in 1984 that he had been working on in 1983.[12] Moreover, Drew's mother testified that while Drew may have been making some progress at school, he was not transferring what he had learned at school to the home environment. Mrs. P. also testified that when Drew was at home, he was unable to perform those tasks listed in his IEP, was not achieving the goals listed in his IEP, and in her opinion, was not developing in a manner that would allow him to live a life outside his parents' home. Mrs. P.'s testimony that Drew was performing differently at school than he was at home is consistent with expert testimony at trial to the effect that a change in an autistic child's environment frustrates the child and inhibits progress. Mrs. P. added that Drew now had the ability to overpower her, had become increasingly aggressive, and had developed the habit of continually grabbing food from his younger sister's plate. Drew required constant supervision at home, because of his insensitivity to danger.

At trial the CCSD presented the testimony of two members of the CCSD Special Education Staff. These two individuals had prepared a hypothetical educational

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12. Proceedings before the Regional Hearing Officer, April 12, 1985, at pp. 141-46 (testimony of Sharon Swaim).

placement plan that could have been offered to Drew if he returned to the CCSD. The plan contemplated the placement of Drew in a single classroom with three other students who were mentally retarded, but who had similar mental ages as Drew. Because of the hypothetical nature of the plan, the evidence is insufficient to determine whether such a plan would meet the educational needs of Drew.

In addition to testimony that was similar to that presented at the administrative hearing, Plaintiffs introduced the videotaped deposition of Dr. Lee Marcus, a psychologist and faculty member at the University of North Carolina School of Medicine. In conjunction with his work at the University, Dr. Marcus is the clinical director of the Piedmont TEACCH Center.[13] TEACCH is a program sponsored by the State of North Carolina which serves autistic individuals and their families through diagnostic and assessment methods, parental counseling, and school consultation. Drew has been evaluated at the TEACCH Center on two separate occasions. Both sides agree that Dr. Marcus is an authority on the education of autistic children.

The court was unable to consider Dr. Marcus' testimony until after the trial. After reviewing the videotaped deposition, the court felt that while Dr. Marcus' testimony could be a valuable guide in the resolution of this case, the deposition failed to shed sufficient light on Dr. Marcus' views of residential placement for autistic children. The court prepared a list of additional questions for Dr. Marcus, and both sides agreed to a supplemental telephonic deposition of Dr. Marcus. Under

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13. TEACCH stands for Treatment and Education of Autistic and Related Communications Handicapped Children.

this procedure, a conference call was arranged during which Dr. Marcus answered the questions put to him by the court, and each attorney was given an opportunity to question Dr. Marcus about his answers.

In response to the court's question, "[i]s twenty-four hour care in a residential placement facility necessary for an autistic child to achieve educational progress?," Dr. Marcus responded as follows: "I would say not for every autistic child; certainly for some, a twenty-four hour care is necessary and my understanding and history that we've had with [Drew's] case over the years, I'd say that that *is* necessary for Drew."[14] The court also asked Dr. Marcus whether twenty-four hour residential placement was the optimum situation for an autistic child such as Drew, or the minimum that a severely autistic child would require to make progress. Dr. Marcus had stated earlier that Drew's autism problem was severe,[15] and he responded to the court's question as follows:

> In one sense it's optimum because I think you can't do better than having twenty-four hour [placement]. On the other hand, I think it's realistic and apropriate [sic]. So, optimum may imply that it's ideal. I would argue that it's not a question of ideal, it's a question of what's needed.[16]

The unequivocal response of Dr. Marcus to the court's last question is indicative of his understanding of what is required for the educational progress of severely autistic children.

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14. Court's Telephonic Deposition of Dr. Lee M. Marcus, October 22, 1987, at p. 2.

15. *Id.* at 2.

16. *Id.* at 3.

> The court: Based on your knowledge of Drew's condition, would you say whether or not you feel that residential placement is necessary for him to achieve educational progress, and we earlier talked about the difference between the optimum or the best situation, and the kind of floor situation, and I want you to direct it not towards the best situation, but towards the floor, so to speak, for him to achieve educational progress.
>
> Dr. Marcus: Yeah, I think it's necessary.[17]

Throughout the remainder of the telephonic deposition, Dr. Marcus seemed to stress two points. First, Dr. Marcus' testimony reveals that he thinks an autistic child benefits from interaction in a public school setting. In Drew's case, however, Dr. Marcus testified that while time in the public school was good, the learning process must be extended beyond the eight-hour day that a public school special program could provide. Dr. Marcus stated that, "[Drew] is the kind of youngster who needs the more integrated full day and weekends and summer and all that to progress properly."[18] Second, Dr. Marcus cited the importance of having a teacher that is trained to work with autistic children. On two different occasions, Dr. Marcus testified about the importance of teacher training.

> . . . unless [the] teacher has a full grasp of Drew's autism problems, as well as the mental retardation problems, then that might jeopardize the possibility of progress.[19]

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17. *Id.* at 9-10.
18. *Id.* at 18.
19. *Id.* at 5.

> . . . I can't imagine anyone who does not have experience or some training with autistic children being able to help that child unless they were extraordinarily gifted and intuitive and there are very few people like that.[20]

Finally, the court notes the testimony of Dr. Peter Thomas, who was called as an expert witness for the CCSD at trial. Dr. Thomas is a licensed psychologist and a school psychologist licensed by the Department of Education of the State of Georgia. In preparing a diagnosis of Drew, Dr. Thomas concluded that Drew functioned in the severely retarded range and met the criteria for having infantile autism. After reviewing much of the evidence available before trial, Dr. Thomas stated that Drew required an educational program with a small teacher-pupil ratio which should be highly routinized. The thrust of Dr. Thomas' testimony, however, was that Drew did not require twenty-four hour a day residential placement to benefit from an educational program.

## II. CONCLUSIONS OF LAW

The court begins its inquiry by noting the unique factual situation presented in this case. Drew is an individual who is suffering from two handicaps which adversely impact each other. Those skills Drew may have been learning in the CCSD were not being transferred into the home environment, and the ability of Drew's parents to control him at home decreased as he grew older. Accordingly, the court's ruling is not meant to be stretched beyond the narrow bounds established in this case.

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20. *Id.* at 20.

A. *The EHCA*

Plaintiffs are seeking residential placement for Drew and reimbursement under the Education for All Handicapped Children Act.[21] The EHCA provides federal money to assist states and local agencies in furnishing educational services to handicapped children. Although the Act supplies financial assistance to those states that

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21. Plaintiffs also have requested relief pursuant to section 504 of the Rehabilitation Act, 29 U.S.C. § 794. This court notes, however, that Plaintiffs need not rely on section 504 as an alternative basis for relief. Every substantive right Plaintiffs claim has been violated is protected under the provisions of the EHCA. Moreover, the relief Plaintiffs seek is available under the EHCA. The Supreme Court recently held that a plaintiff who asserts a valid claim under the EHCA cannot also proceed under the Rehabilitation Act. *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457 (1984); *see also Georgia Ass'n of Retarded Citizens v. McDaniel*, 740 F.2d 902 (11th Cir. 1984), *cert. denied*, 469 U.S. 1228, 105 S. Ct. 1228 (1985). Accordingly, the court will not address Plaintiffs' section 504 claim.

The court notes that the portion of *Smith* which held that attorney's fees are not recoverable under either the EHCA or the Rehabilitation Act has been modified by recent federal legislation. See 20 U.S.C. § 1415(e)(4)(B) (Supp. 1987) (in any proceeding brought under this subsection, the court may use its discretion to award reasonable attorney's fees).

Plaintiffs also made a broad allegation in the Complaint that the Defendant had violated Plaintiffs' "Constitutional and Statutory rights," and invoked 42 U.S.C. § 1983 as a basis for relief. The court, however, has neither seen nor heard of a violation of any constitutional right throughout the course of these proceedings. If such a violation under section 1983 did exist, it would necessarily be an equal protection claim and not a due process claim, since Plaintiffs have conceded that Defendant has abided by the procedural requirements set forth in the EHCA. In the *Smith* case, the Supreme Court held that where a handicapped child asserts a right to a free appropriate public education, and the EHCA is available, a claim based either on the EHCA or on the Equal Protection Clause may be brought only under the EHCA. *Smith*, at 1008-09, 104 S. Ct. at 3466-67; *Manecke v. School Bd. of Pinellas County, Florida*, 762 F.2d 912, 918 (11th Cir. 1985), *cert. denied*, U.S. ....., 106 S. Ct. 809 (1986). Therefore, this court concludes that Plaintiffs are not entitled to relief under section 1983.

comply with its provisions, the Act also imposes certain duties and obligations on the state and local agencies receiving the funds. Perhaps the most important responsibility of those states receiving funds is to effect "a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). The Act defines a "free appropriate public education" as follows:

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414 (a)(5) of this title.

20 U.S.C. § 1401(18). As used in the definition of a "free appropriate public education," the term "special education"

> means specifically designed instruction, at no cost to parents or guardians, *to meet the unique needs of a handicapped child,* including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

20 U.S.C. § 1401(16) (emphasis added). The term "related services" is used to denote those developmental, corrective, and other supportive services that "may be required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401(17).

Although the Act does not specifically mention residential placement as a component of special education or related services, the regulations promulgated under the

Act resolve any possible doubt as to whether residential placement can be required under the Act.

> If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

34 C.F.R. § 300.302 (1986).

The Supreme Court has established specific parameters for district courts to follow when determining whether the state has provided a free appropriate public education to a handicapped child. *Bd. of Educ. of Hendrick Hudson Central School Dist. Bd. of Educ., Westchester County v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). As noted by the Court, an appropriate education for a handicapped child generally is outlined in the child's IEP. *Id.* at 181-82, 102 S. Ct. at 3038. The program set forth in the IEP must provide the child with a "basic floor of opportunity" consisting of access to the specialized instruction and related services designed to provide an educational benefit to the handicapped child. *Id.* at 201, 102 S. Ct. at 3048.

The *Rowley* Court rejected the argument that the Act requires a state to "maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children." *Id.* at 200, 102 S. Ct. at 3048. The Court concluded that the primary intent of Congress was to identify and evaluate handicapped children, and to provide them with access to the type of free public education that would be "sufficient to confer some educational benefit upon the handicapped child." *Id.* As recognized by the Court, however, the determination of when a handicapped child is receiving

sufficient educational benefits as required by the Act can present a difficult problem, the resolution of which will vary from case to case. *Id.* at 201-02, 102 S. Ct. at 3048-49.

To insure that those states receiving federal money do not neglect their obligation to provide a free appropriate public education to the handicapped, the Act provides certain procedural safeguards. Parents have a right to participate in the development of a child's IEP, and they have the right to complain about any matter relating to the provision of a free appropriate public education for their child. If the parents wish to file a complaint, they have the right to an impartial due process hearing before an individual who is not an employee of the agency or local unit involved in the education or care of the child. 20 U.S.C. § 1415(b)(2). If such a hearing is conducted by a local educational agency, any aggrieved party is entitled to an impartial review of the hearing by the state educational agency. 20 U.S.C. § 1415(c). Any party aggrieved by the decision of the state agency may file suit in a state court of competent jurisdiction or in a federal district court without regard to the amount in controversy. 20 U.S.C. § 1415(e)(2).

With respect to the district court's duty to review the decision of the state agency, the Act provides as follows:

> the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of the party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

*Id.* The Supreme Court in *Rowley* concluded that a district court's inquiry under section 1415(e)(2) is twofold:

first, the court must determine whether the state has complied with the procedures set forth in the Act; and second, the court must decide whether the individualized educational program is reasonably calculated to enable the child to receive educational benefits. *Rowley* at 206-07, 102 S. Ct. at 3051. Although a district court has the authority to make independent decisions, it must give the state administrative hearings due weight. *Id.* at 206, 102 S. Ct. at 3051.

The issue for this court, then, is whether Plaintiffs have shown by a preponderance of the evidence that the failure of the CCSD to change Drew's IEP and provide Drew with residential placement has denied Drew sufficient access to a free appropriate public education through which Drew can achieve some educational benefit. After a thorough review of the administrative record in this case and the evidence presented in connection with the trial, the court concludes that Plaintiffs have satisfied their burden that the CCSD deprived Drew of a free appropriate public education by refusing to place Drew in a residential treatment facility.

Several factors have convinced this court that residential placement is necessary if Drew is going to obtain an appropriate education as defined by the Supreme Court in *Rowley*. The court notes that residential placement has been recommended for Drew on a number of occasions in the past. When Drew was 3½ years old, he was evaluated at Emory University and diagnosed as suffering from autism and severe mental retardation. Residential placement was suggested at that time.[22]

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22. *See* Psychiatric Evaluation regarding Drew P. prepared by A. Allison Grant, M.D. on March 24, 1981. Dr. Grant's Evaluation was introduced as Plaintiffs' Exhibit 3 at the proceedings before the Regional Hearing Officer and is included in the AHT.

On June 7, 1984, while Drew was still in the CCSD, Drew's mother filed an application with the Developmental Services Unit of the Northeast Georgia Community Health - Mental Retardation Center asking that Drew be placed in a residential facility. When the application was made, the Center reviewed Drew's records and conducted meetings with school officials to determine whether residential placement was needed. Although officials at the Center concluded that Drew should remain in the CCSD, they recognized that some change was needed. Their recommendation was that a referral be made to the residential services department in the State, and that funds be gathered to establish a developmental training home in which Drew could be placed. They also recommended that an in-home trainer be provided until a developmental home was established. The evidence shows, however, that neither the CCSD nor the State of Georgia provided the type of home the Center had recommended.

Following Drew's stay at the Parkwood Facility in Valdosta, Georgia, both Dr. Margaret Hiers and the officials at Parkwood concluded that placement in a residential facility was necessary to meet the needs of a severely autistic adolescent such as Drew.

In addition to the fact that residential placement has been recommended for Drew, the court notes other cases dealing with autistic children in which residential placement was ordered. *See e.g., Stacey G. v. Pasadena Independent School Dist.*, 695 F.2d 949 (5th Cir. 1983); *Parks v. Pavkovic*, 536 F. Supp. 296 (N.D. Ill. 1982), *aff'd in part, rev'd in part*, 753 F.2d 1397 (7th Cir. 1985); *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979), *cert. denied*, 452 U.S. 968, 101 S. Ct. 3123 (1981). Although the court is well aware that determinations regarding

residential placement must be made on an individualized, case-by-case basis, it is worthwhile to note that courts have upheld residential placement for children with disabilities similar to Drew's. Moreover, in the cases mentioned above, the children already had been residentially placed by the state, and the issues involved focused either on the period of time of the placement, or the source of payment for the placement.

The court also is persuaded by the testimony of Drew's mother in which she stated that before Drew was residentially placed, he was unable to perform any of his IEP tasks at home, was becoming increasingly aggressive, and at times was difficult to control. This testimony is in accord with the expert testimony presented at trial, in which both Dr. Hiers and Dr. Marcus stated that autistic children have a very difficult time transferring skills from one environment to another, and that "sameness" is an important element in an autistic child's ability to progress. Drew's mother also testified that after Drew returned from the Tokyo School, he was calmer and could be directed by verbal command. Moreover, Marty Johnston, who observed Drew in a physical education program during the summer of 1987, testified that Drew had changed dramatically since she had worked with him in the summer of 1984. Johnson testified that while Drew's behavior in 1984 almost precluded him from participation in the program, when she observed him in 1987, Drew could be verbally directed, and he was much more cooperative during group activities.

Finally, the factor that this court finds most persuasive in making its determination is the testimony of Dr. Lee Marcus. The court recognizes that neither the Regional Hearing Officer nor the State Hearing Officer

had Dr. Marcus' testimony before them at the time of their decisions. Dr. Marcus' testimony has been discussed at length above, and the court will not now reiterate what already has been written. The court will add, however, that during the deposition, Dr. Marcus stated that he had sufficient contact with Drew and knowledge of Drew's condition to allow him to accurately access whether residential placement was warranted. Dr. Marcus further testified that while residential placement was not appropriate for every autistic child, it was needed in Drew's situation.

*B. Remedy*

Plaintiffs have asked for reimbursement for all expenses incurred in obtaining residential placement for Drew, attorney's fees, and residential placement for Drew until he reaches 21 years of age.[23] The EHCA gives a district court the authority to grant the type of relief requested by the Plaintiffs. The Eleventh Circuit recently stated that in deciding whether reimbursement should be given in a particular case, the district court should balance the equities and determine what amount if any would be appropriate. *Jenkins by and through Jenkins v. State of Florida*, 815 F.2d 629, 631 (11th Cir. 1987).

Although the State Board of Education of Georgia is not a party in this suit, the court recognizes that the ultimate responsibility for complying with this court's

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23. 20 U.S.C. § 1412(2)(B) provides in pertinent part:

> a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980 . . . .

order of relief will fall on the State. Section 1412(6) of the EHCA expressly dictates that the state educational agency is responsible for ensuring compliance with the Act.[24] Because the CCSD is the only party defendant in this suit, however, the court's Order must be directed to the local school board.

As enumerated above, the court finds that residential placement is necessary if Drew is going to receive a free appropriate public education. Under the authority of section 1415(e)(2) of the EHCA, a district court can direct a local educational agency to provide the necessary special educational services required for a handicapped child to receive a free appropriate public education. *Burlington School Comm. v. Dept. of Educ.*, ..... U.S. ....., 105 S. Ct. 1996 (1985). Accordingly, this court orders the CCSD to provide Drew with residential placement until the age of 21, or in the alternative, to pay for placement in a residential facility that has been mutually agreed upon by Drew's parents and school officials of the CCSD.

The court now turns to the issue of reimbursement. The Supreme Court recently held that the EHCA au-

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24. Section 1412(6) provides as follows:

> The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

20 U.S.C. § 1412(6) (Supp. 1987).

thorizes a court to reimburse parties for special education if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act. *Burlington* at ....., 105 S. Ct. at 2002-03. Since this court finds that Drew's parents were justified in placing him in a residential facility, the court has the authority to order reimbursement to the parents.

The court, however, is troubled by the fact that Drew's parents chose a residential facility 8,000 miles from home in which to place Drew. Although the State of Georgia may not have an appropriate residential facility for autistic children, certainly one should not need to traverse the Pacific Ocean to find an adequate residential facility for children with disabilities similar to Drew's. Conversely, the court notes that the State of Georgia did not and does not now provide an appropriate treatment facility for severely autistic children who have passed the age of twelve.[25] The court further recognizes that while attempts were made to gather funds to begin a developmental home in which Drew could live, no such home was ever established.

After balancing the equities in this case, the court feels that while Plaintiffs should receive some reimbursement, they are not entitled to reimbursement from January, 1985. At this time, however, the court does not have sufficient evidence before it to address the issue of reimbursement. The court orders that Plaintiffs submit an itemized statement of the costs incurred in placing Drew in residential facilities, along with an itemized statement of the amount of attorney's fees Plaintiffs are seeking. Following receipt of these statements, the

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25. Proceedings before the Regional Hearing Officer, April 12, 1985, at p. 36 (testimony of Drew's mother).

court will issue a supplemental Order addressing the issues of reimbursement and attorney's fees.

In issuing this Order in which the court finds that residential placement is necessary for Drew, the court does not mean to imply that the school in Boston is the appropriate place for Drew. As stated in Plaintiff's Post-Trial Brief, group homes for autistic children are available in North Carolina. Moreover, the parents have stated that they would be willing to place Drew in one of those homes. The court hopes that the parties can agree on the proper placement for Drew at the end of his term in Boston. It is the court's belief that the parties can come to a mutually acceptable arrangement that would include appropriate placement for Drew at a minimum cost to the CCSD.

The court understands the importance of this decision and the burden it places on the local school district involved.[26] Thus, the court finds it necessary to emphasize that this decision is limited to the unique situation involving a severely autistic child suffering from severe mental retardation. As Judge Williams of the Fifth Circuit has stated, federal courts should be reluctant to expand the scope of the EHCA "simply because they honestly and very properly feel sorry for the claimants." *Stacy G.*, 695 F.2d at 956 (Williams, J. concurring). The

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26. Other courts also have recognized that the unequivocal congressional directive to provide an appropriate education for all handicapped children places a substantial burden on states in certain instances. *See e.g., Smith* at 1020, 104 S. Ct. at 3473; *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 695 (3d Cir. 1981). As stated by the court in *Kruelle*, however, the educational agencies of the state are required to furnish the services necessary to provide a handicapped child with an appropriate education "regardless of financial and administrative burdens." *Kruelle*, 642 F.2d at 695.

evidence in the present case, however, strongly indicates that Drew cannot progress absent residential placement. Therefore, this court is simply giving Drew what he is entitled to under the EHCA, the right to enjoy a free appropriate public education.

Accordingly, the court finds for the Plaintiffs and directs the CCSD to implement an IEP placing Drew in an appropriate residential facility for autistic children. The court will defer its ruling on reimbursement and attorney's fees until it receives additional documentation as requested in this Order.

SO ORDERED, this 23 day of December, 1987.

/s/ Duross Fitzpatrick
Duross Fitzpatrick, Judge
United States District Court

(Filed February 18, 1989)

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF GEORGIA
ATHENS DIVISION

CA NO. 85-119-ATH-(DF)

IN RE: DREW P. By next friend,
Plaintiff,

vs.

CLARKE COUNTY SCHOOL DISTRICT,
Defendant.

**ORDER**

On December 23, 1987 this court entered an Order requiring the Clarke County School District (CCSD) to provide residential placement for Drew P., the severely autistic and severely mentally retarded minor Plaintiff represented in this action. The Order stated that in the event it could not provide a residential facility, the CCSD would be required to pay for residential placement in a facility mutually agreed upon by Drew's parents and school officials of the CCSD.

Although the December 23rd Order addressed the issue of placement, the court reserved the questions of reimbursement and attorney fees until the parties could submit additional evidence pertaining to these two questions. On January 14, 1988 Defendant filed a Notice of Appeal with the court, along with a Motion for Stay

of Proceedings to Enforce Judgment. The following day the court held a post-trial evidentiary hearing on reimbursement and attorney fees. The court issues this supplemental Order to address the questions of reimbursement and attorney fees, and to dispose of all issues which remain open so that this case may proceed on appeal.

A. *Defendant's Motion to Stay*

Pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, Defendant moves the court to stay the Order of December 23, 1987 in its entirety pending appeal. Defendant requests in the alternative that the court modify its Order so that no IEP requiring residential placement is mandated for the balance of the 1987-88 school year. Defendant further asks the court to modify that portion of the December 23rd Order which requires residential placement until Drew reaches the age of twenty-one.

Rule 62(c) states in pertinent part:

> (c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Fed. R. Civ. P. 62(c). To be entitled to a stay pending appeal, the movant must show the following: (1) a likelihood of prevailing on the merits of the appeal; (2) irreparable injury unless the stay is granted; (3) an absence of substantial harm to the adverse party if the stay is granted; and (4) that the public interest will be served by issuing the stay. *Garcia-Mir v. Meese,*

781 F.2d 1450, 1453 (11th Cir.), *cert. denied*, ..... U.S. ....., 107 S. Ct. 289 (1986); *Int'l Bhd. of Boilermakers v. Local Lodge D46*, 667 F. Supp. 870, 872 (M.D. Ga. 1987).

The court notes that the parties have reached an agreement concerning Drew's placement for the remainder of the 1987-88 school year. Therefore, the court finds it unnecessary to rule on the portion of Defendant's Motion requesting the court to stay its Order requiring residential placement for the remainder of this school year. The parties, however, have been unable to agree on the source of payment for Drew's placement following the 1987-88 school year. Plaintiffs contend that the CCSD should bear the financial burden, whereas the CCSD feels that Plaintiffs should bear the costs until this court's Order is reviewed by the Eleventh Circuit. The thrust of the December 23rd Order was that the CCSD should either provide residential placement for Drew or pay for such placement in an appropriate facility. Therefore, a denial of CCSD's Motion to Stay will have the effect of requiring the CCSD to pay for residential placement following the 1987-88 school year.

The court is of the opinion that Movant CCSD has failed to show a likelihood of prevailing on the merits of the appeal. Defendant states in its Motion that it "respectfully submits that the Court erred in concluding that CCSD was not providing Drew with a free appropriate education and requiring the implementation of an IEP placing Drew in a residential facility for autistic children." The court disagrees with Movant's statement, and for the reasons fully set forth in its Order of December 23rd, is of the opinion that the ruling requiring residential placement will be upheld on appeal.

Moreover, the court finds that the CCSD has failed to show that it will be irreparably injured if the stay is denied. The Eleventh Circuit has stated that an injury is irreparable only if it cannot be compensated by monetary damages. *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987) (defining irreparable injury under the standard for granting preliminary injunctions). If the court denies the stay, the CCSD will be required either to provide Drew an appropriate residential facility or pay for placement in such a facility. These "injuries" can be compensated by monetary damages.

The court is somewhat concerned, however, about Defendant's statement in its Motion for Stay that the December 23rd Order is overbroad in requiring residential placement for Drew until the age of twenty-one. Defendant states that the portion of the Order requiring residential placement until age twenty-one is in conflict with federal law requiring Individualized Education Program (IEP) meetings on at least an annual basis. *See* 34 C.F.R. § 300.343 (1987). The court will attempt to correct any confusion created by this portion of the December 23rd Order.

The court's Order does not require the parties to abandon annual IEP meetings, and such meetings should be conducted in accordance with federal law. After hearing and reviewing the testimony of the expert witnesses at trial, however, the court is of the opinion at this time that if Drew is going to receive a free appropriate education as contemplated under the Education for All Handicapped Children Act (EHCA), residential placement will be necessary until Drew reaches the age of twenty-one. If, at a later time, the parties conclude that residential placement is no longer necessary, the

court will not interfere with that decision. The Order simply concludes that residential placement be provided to Drew, and that such placement continue until age twenty-one unless Drew's progress shows, and the parties agree, that residential placement is no longer necessary for Drew.

For the reasons stated above, Defendant's Motion for Stay is hereby denied, and Defendant will be financially responsible for Drew's residential placement following the 1987-88 school year. Moreover, the court clarifies its December 23rd Order by stating that the parties must conduct annual IEP meetings to address Drew's progress.

B. *Reimbursement*

Plaintiffs brought this action seeking residential placement for Drew and reimbursement for the expenses Plaintiffs had spent in placing Drew in residential facilities since January of 1985. Plaintiffs submitted a post-trial itemization of these expenses. At the January 15, 1988 evidentiary hearing, Drew's mother took the stand and testified that the residential facility in Tokyo was lower in price than any other available residential facility in the United States.

The Supreme Court recently held that the EHCA gives district courts "the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *Burlington School Comm. v. Dept. of Educ.*, 471 U.S. 359, ....., 105 S. Ct. 1996, 2002-03 (1985). The *Burlington* Court also held that the unilateral change of placement by the parents during the course of review proceedings would not constitute

a waiver of the right to reimbursement. *Id.* at ....., 105 S. Ct. at 2004. The Court further noted that the language of the Act confers broad discretion on the district courts in fashioning relief, *id.* at ....., 105 S. Ct. at 2003, and concluded its opinion by stating that equitable considerations are relevant in determining the scope of such relief. *Id.* at ....., 105 S. Ct. at 2005; *Jenkins by and through Jenkins v. State of Florida,* 815 F.2d 629, 631 (11th Cir. 1987) ("[w]hether reimbursement is appropriate, and at what amount, should be determined by balancing the equities of the particular case").

In its Order of December 23, 1987, this court found that the CCSD was not providing Drew with a free appropriate education as contemplated under the Act. The court further found that Drew could receive such an education only through residential placement. Therefore, under the Supreme Court's holding in *Burlington,* this court has the authority to order the CCSD to reimburse Plaintiffs for their expenses in placing Drew in residential facilities since January of 1985.

The question of reimbursement, however, has been a troublesome one for the court. Both parties have presented persuasive arguments as to why full reimbursement either should or should not be given. After considering the post-trial evidence submitted by the parties and listening to the testimony and argument presented at the post-trial evidentiary hearing, the court remains convinced that while Plaintiffs should receive some reimbursement, they should not receive all the relief they request.

Plaintiffs request reimbursement in a total amount of $58,628.18. The court has found, and Plaintiffs have conceded, however, that the placement at the Parkwood

facility was not appropriate; therefore, the court will not grant reimbursement for any money spent by Plaintiffs at Parkwood.

Moreover, the court notes that Plaintiffs unilaterally removed Drew from the CCSD with little notice to Drew's teachers or CCSD officials, and thus made little attempt to achieve a negotiated compromise or an agreement on private placement.[1] Conversely, the court notes that other than a brief attempt to gather funds to establish a developmental home for Drew, the CCSD did little to provide an appropriate residential facility.

After balancing the equities in this case and recognizing the need for the wisdom of Solomon in deciding the reimbursement question, the court finds that the CCSD should reimburse Plaintiffs in the amount of $42,637.00 for the expenses they incurred in placing Drew in residential facilities over the last three years. This amount represents the sum of the tuition, school fees, and uniform fees paid by Plaintiffs for Drew's placement in the residential facilities in Tokyo and Boston. Recognizing that some equities weigh in favor of Defendant, the court has excluded the costs of air fare, lodging, and transportation from the amount of total reimbursement requested by Plaintiffs.

### C. *Attorney Fees*

Congress amended the EHCA in 1986 to allow a discretionary award of attorney fees to a party successfully

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1. The court notes that the First Circuit Court of Appeals stated in dictum in its *Burlington* decision that the unilateral withdrawal of the handicapped child from the public school system "may be taken into account in a district court's computation of an award of equitable reimbursement." *Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 799 (1st Cir. 1984) quoted in *Burlington*, 471 U.S. at ....., 105 S. Ct. at 2001.

bringing suit under the EHCA. The amended portion of section 1415 states in pertinent part:

> In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

20 U.S.C.A. § 1415(e)(4)(B) (West Supp. 1987).

Plaintiffs have asked for an award of attorney fees in the amount of $19,284.00. This figure represents 127.70 hours of attorney time billed at $125.00 per hour. Defendant contends that any award of attorney fees should not exceed the sum of $7,500.00.

Although Plaintiffs request $125.00 per hour, the court finds, and the parties agree, that the appropriate rate in this case should be $75.00 per hour. Multiplying the 127.70 hours by $75.00 per hour, the court arrives at a figure of approximately $9,500.00. The court notes, however, that Plaintiff attorney failed to keep contemporaneous time records in this case, and Defendant has pointed out certain inaccuracies in Plaintiff's reconstructed records.

Noting the inaccuracies pointed to by Defendant and recognizing the difficulties involved in reconstructing a record of billing time reaching back to December of 1984, the court, in its discretion, finds that the final amount of attorney fees to be awarded should fall in between Defendant's $7,500.00 figure and the $9,500.00 figure represented by multiplying 127.70 hours at $75.00 per hour. Therefore, the court finds that Plaintiffs are entitled to an award of attorney fees in an amount of $8,500.00.

Accordingly, Defendant's Motion for Stay of Proceeding is DENIED, and Defendant is ordered to either provide or pay for an appropriate residential placement for Drew following the 1987-88 school year. Further, this court's Order of December 23, 1987 is clarified to the extent it requires the parties to conduct annual IEP meetings. Finally, the court orders Defendant to reimburse Plaintiffs in an amount of $42,637.00 for the expenses of residential placement from September, 1985 to the present, and the court finds that Plaintiffs are entitled to an award of attorneys fees in an amount of $8,500.00.

SO ORDERED this 18 day of February, 1988.

/s/ Duross Fitzpatrick
Duross Fitzpatrick, Judge
United States District Court

In re DREW P. by Next Friend,
Plaintiff-Appellee,

v.

CLARKE COUNTY SCHOOL DISTRICT,
Defendant-Appellant.

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Nos. 88-8031, 88-8124.

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United States Court of Appeals,
Eleventh Circuit.

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July 20, 1989.

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Parents brought action under Education for All Handicapped Children Act, challenging school authority's refusal to pay for autistic and severely mentally retarded child's placement in residential treatment facility for autistic children. The United States District Court for the Middle District of Georgia, 676 F.Supp. 1559, Duross Fitzpatrick, J., No. CA85-119-ATH, required school district to provide child with residential treatment in such facility until age 21 and ordered reimbursement of parents' past educational expense and attorneys fees. School district appealed. The Court of Appeals, Hoeveler, District Judge, sitting by designation, held that: (1) evidence supported determination that placement in residential treatment facility for autistic children was necessary to provide child with basic floor of educational opportunity; (2) parents were properly reimbursed for past expense of private placement of child in residential treatment facilities for autistic children in Tokyo and Boston and for their attorneys fees; (3) requiring residential place-

ment of child until age 21 was not abuse of discretion; and (4) admission of Tokyo school records was harmless error, if any.

Affirmed.

1. Administrative Law and Procedure (Key) 784
Schools (Key) 155.5(2)

Extent of deference to be given administrative findings of fact concerning appropriate placement of handicapped child under Education for All Handicapped Children Act is left to discretion of federal district court; the district court must consider administrative findings of fact, but is free to accept or reject them. Education of the Handicapped Act, §§ 601-685, as amended, 20 U.S. C.A. §§ 1400-1485.

2. Schools (Key) 148(2)

In order to satisfy its duty to provide free, appropriate education under Education for All Handicapped Children Act, state must provide personalized instruction with sufficient support services to permit child to benefit educationally from that instruction. Education of the Handicapped Act, §§ 601-685, as amended, 20 U.S.C.A. §§ 1400-1485.

3. Schools (Key) 155.5(4)

Evidence supported determination that teenager handicapped with infantile autism and severe mental retardation required residential treatment in facility for autistic children in order to receive basic floor of educational opportunity guaranteed by Education for All Handicapped Children Act. Education of the Handicapped Act, §§ 601-685, as amended, 20 U.S.C.A. §§ 1400-1485.

4. Schools (Key) 154(4)

Reimbursement of past expense of private placement is proper under Education for All Handicapped Children Act if court determines that child's placement was proper. Education of the Handicapped Act, §§ 601-685, as amended, 20 U.S.C.A. §§ 1400-1485.

5. Schools (Key) 154(3)

Reimbursement for Georgia parents' costs incurred in placing severely mentally retarded and autistic teenager in residential schools in Boston and Tokyo was properly ordered, particularly where state responsible for child did not recognize autism as discrete disorder, had failed to establish standards for treatment of autistic children, and did not have appropriate treatment facility. Education of the Handicapped Act, §§ 601-685, as amended, 20 U.S.C.A. §§ 1400-1485.

6. Schools (Key) 154(3)

Ordering residential placement of teenager suffering from infantile autism and severe mental retardation until age 21 in facility for autistic children was not abuse of discretion. Education of the Handicapped Act, §§ 601-685, as amended, 20 U.S.C.A. §§ 1400-1485.

7. Schools (Key) 155.5(2)

Even assuming that foundational requirements for admission of handicapped teenager's foreign school records as business records were not satisfied, their admission was harmless error, where they were merely cumulative of other admissible evidence concerning teenager's progress at school. Education of the Handicapped Act, §§ 601-685, as amended, 20 U.S.C.A. §§ 1400-1485.

Appeal from the United States District Court for the Middle District of Georgia.

Before HATCHETT and CLARK, Circuit Judges, and HOEVELER,* District Judge.

HOEVELER, District Judge.

This appeal involves an action brought against the Clarke County School District, Clarke County, Georgia (the "school district" or "CCSD"). Plaintiff Drew P. is a child diagnosed as both autistic and severely mentally retarded. He sues through his parents and next friends who contend that the school district has failed to comply with the Education for All Handicapped Children Act (the "EHA" or the "Act"), 20 U.S.C. sections 1400-1485 (1982 & Supp. IV 1986). The primary issue this case presents is a question of statutory interpretation: whether EHA requires a school district to provide a child handicapped with infantile autism and severe mental retardation residential treatment in a facility for autistic children until the age of twenty-one.

*Background*

Drew P. is an autistic and severely mentally retarded sixteen year old who exhibits many of the behavior patterns common to autistic children.[1] Drew was diagnosed

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*Honorable William M. Hoeveler, U.S. District Judge for the Southern District of Florida, sitting by designation.

1. The district court judge's findings of fact indicate that Drew is distant in his relationships with people, communicates by primitive sign language, has difficulty in coping with changes in his environment, is becoming increasingly aggressive and cannot be left unattended. *In Re Drew P. v. Clarke County School District*, 676 F.Supp. 1559, 1561 (M.D.Ga.1987). These symptoms correspond with the definitions of autism issued by the

(Continued on following page)

as suffering from infantile autism and mental retardation when he was three. At that time, the diagnostician at Emory University recommended residential placement. Instead, Drew entered the CCSD special education program at the age of five, where he remained until January, 1985. Drew spent his second year in the CCSD in the Georgia Retardation Center, a residential treatment center. That was the only year in which he received training from an individual experienced in working with autistic children.

In June, 1984, Drew's parents applied to the Georgia Community Health-Mental Retardation Center (the "Center") for Drew's placement in a residential center. The Center concluded that Drew should remain with CCSD, although it recommended placement in a developmental training home with interim care by an in-home trainer. No such developmental training home was established. The school district did provide Drew with an in-home trainer in the fall of 1984, but with limited success.[2]

Drew became increasingly aggressive at home and began to perform differently at home than at school. He failed to transfer what he learned in school to the home environment, became unable to perform tasks listed in his individualized education plan ("IEP") at home, and was failing to achieve the goals set by his IEP. In January, 1985, Drew's parents withdrew him from CCSD

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Footnote continued—

National Society for Autistic Children. *Id.* The judge concluded that the evidence from state administrative hearings and the trial indicated that Drew had, throughout his lifetime, exhibited many of the behaviors characteristic of autism. *Id.*

2. The trainer testified at trial that during the time she was with Drew he could not be guided by verbal command, and required constant supervision. *In re Drew P.*, at 1562.

and placed him in the Parkwood Developmental Center ("Parkwood"), a residential center for the severely mentally retarded.

While at Parkwood, Drew was evaluated by Dr. Margaret Hiers, an educational consultant with a doctorate in mental retardation. Dr. Hiers and the Parkwood staff concluded that Drew was not receiving the optimum educational benefit at Parkwood and recommended placement in a residential center with facilities for autistic children. No such center existed in the state of Georgia.

Because the CCSD refused to accept responsibility for the costs of the Parkwood placement, Drew's parents requested an administrative hearing on the matter. On April 12, 1985 a hearing was held. The regional hearing officer determined that Drew did not require residential placement in a facility for autistic children, thus obviating any requirement that the CCSD reimburse Drew's parents for the costs of residential treatment. On appeal, the state hearing officer sustained the regional officer's holding. Following the final decision of the state hearing officer, plaintiffs filed suit in federal district court.

In the meantime, Drew had been placed in a residential center for autistic children in Tokyo, Japan. He was there from September, 1985 until August, 1987. Thereafter, Drew was transferred to the Japanese school's newly opened sister-school in Boston, MA for the 1987-88 school year.

The district court determined on December 23, 1987 that Drew P.'s educational needs could not be met by the programs available in the Georgia school district. The court held further that for Drew to receive a "free

and appropriate education," as required under the Act, the Clarke County School District must either place Drew P. in a residential treatment facility for autistic children until the age of twenty-one, or provide funds for such placement.

By separate order, the court awarded Drew's parents partial reimbursement for the costs of residential treatment centers in Tokyo and Boston and attorney's fees. The court found, and the plaintiffs conceded, that the placement at Parkwood was not reimbursable because it was not an appropriate placement. The plaintiffs were awarded the sum of $42,637.00, representing tuition, school fees and uniform fees paid by the plaintiffs for Drew's placement in the residential facilities in Tokyo and Boston. Costs for travel and lodging were excluded. In addition, the court awarded the plaintiffs $8,500.00 in attorney's fees. The school district appealed. For the reasons stated below we affirm.

*Discussion*

The EHA requires that states receiving federal funds effect "a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. section 1412(1). An appropriate education is defined under the statute as one "designed . . . to meet the unique needs of a handicapped child." 20 U.S.C. section 1401 (a)(16). States receiving federal funding under the EHA must tailor programs for handicapped children to the unique needs of each child by means of an individualized educational program ("IEP"). Section 1401(a)(18). Each IEP must be developed by the concerted action of the local educational agency, the child's teacher and the child's parents or guardian, and must be reviewed annually by

the local or regional educational agency. 20 U.S.C. sections 1401(a)(19), 1414(a)(5). Parents must be notified of any changes in the evaluation or placement of the child. Section 1415(b)(1)(D). Parents may bring a complaint pertaining to the evaluation at a due process hearing, and have the right to appeal to the state educational agency and subsequently to a state court of competent jurisdiction or to a federal district court. Sections 1415(b)(1)(E), (b)(2), (c).

[1] The district court considered the state administrative officers' findings that residential treatment in a center for autistic adolescents was not necessary for Drew P. and found to the contrary: the district judge determined that Drew could not receive an appropriate education and care for his particular needs without residential treatment.[3] The district court, applying the preponderance of the evidence test, determined that the evidence presented by the school board regarding the appropriateness of its IEP was outweighed by expert testimony that a residential treatment center for autistic children was necessary in order for Drew to receive an educational benefit.[4]

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3. The extent of deference to be given to the administrative findings of fact is left to the discretion of the district court. *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, *reh'ng den.* 864 F.2d 795 (11th Cir.1988). The district court must consider the administrative findings of fact, but is free to accept or reject them. *Id.*

4. This expert testimony included that of Dr. Hiers as well as Dr. Lee Marcus, a psychologist and the clinical director of an autistic diagnostic and counseling center associated with the University of North Carolina School of Medicine, where Dr. Marcus is a faculty member. The district court pointed out that both parties agree that Dr. Marcus is an authority on the education of autistic children. *In re Drew P.*, at 1564. Dr. Marcus, in a post-trial telephonic interview by the court,

(Continued on following page)

The school district appeals this finding based on its argument that the school district was not required to maximize Drew's potential, but only to give him access to free public education. The state must provide the child only with "a basic floor of opportunity." *Board of Education v. Rowley,* 458 U.S. 176, 201, 102 S.Ct. 3034, 3048, 73 L.Ed.2d 690 (1982). CCSD argues that its program provided Drew with such a floor of opportunity. Its expert psychologist, Dr. Peter Thomas, testified that residential placement was not necessary. CCSD claims that under *Rowley,* it is not required to maximize the potential of each child, and that therefore, residential treatment though perhaps optimum placement for the child, was not required under the Act. However, testimony by Dr. Lee Marcus, an expert psychologist recognized by both parties, indicated that residential placement was necessary in order for Drew to receive *any* educational benefit. Furthermore, Dr. Marcus testified that Drew must be educated by teachers specially trained in working with autistic children.

[2] The trial judge recognized that *Rowley* provided the correct legal standard. Nevertheless, he explicitly held that this standard was not met by the CCSD educational program. In order to satisfy its duty to provide a free, appropriate education, a state must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Jefferson County Board of Education v. Breen,* 853 F.2d 853, *reh'ng den.* 864 F.2d 795 (11th Cir.1988).

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**Footnote continued—**

**in which both attorneys participated, stated that in order for Drew P. to achieve educational progress, he would need residential treatment. *Id.* at 1565. Residential treatment was a necessity rather than an optimum situation for Drew, according to Dr. Marcus' testimony. *Id.***

Thus, in order for the CCSD to discharge its duty toward Drew, it must provide him with a setting in which he can receive an educational benefit.

[3] The evidence at trial demonstrated that autistic children require constant, round the clock, expert educational supervision in order to progress. Expert testimony established that Drew, as an increasingly withdrawn autistic teenager, needed placement in such a residential center specializing in the treatment of autistic adolescents. As indicated, testimony by Dr. Marcus made clear that residential placement was necessary in order for Drew to receive *any* educational benefit.

The school board challenges the district court's finding that residential treatment in a center for autistic children is necessary to provide Drew P. with an appropriate education. Although the board contends that the special educational programming afforded Drew was meaningful, individualized and provided under a small staff to student ratio by experienced professionals, there was ample evidence at trial to demonstrate that these professionals were untrained in the special needs of autistic children. Moreover, given the opinions of Dr. Hiers and the Parkwood staff as well as the videotaped and telephonic testimony of Dr. Lee Marcus that residential treatment was necessary for Drew to make meaningful educational progress, the district court's findings are not clearly erroneous. There is sufficient evidence to support the court's findings that CCSD did not provide a basic floor of educational opportunity to Drew.

[4, 5] A second issue on appeal is whether the trial court correctly determined that Drew's parents should be reimbursed for the past expense of private placement in the Tokyo and Boston schools. Reimburse-

ment under the EHA is proper if the court determines the child's placement is proper. *Burlington School Comm. v. Dept. of Education,* 471 U.S. 359, 370, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). Appellant claims that the court erred in determining that Drew's placement in Tokyo and Boston schools was proper. The school district argues that the court below lacked reliable information on which to assess the schools. The problem with this argument, however, is that Georgia itself did not recognize autism as a discrete and separate disorder and therefore had failed to establish standards for the treatment of autistic children. (Brief of Appellees at 19). Because the district judge found that Drew's parents were justified in placing him in the residential facilities, he had the authority to order reimbursement for their costs for the facilities under consideration and for attorneys fees. *Jenkins v. Florida,* 815 F.2d 629 (11th Cir.1987).

The district court was troubled by the choice of a residential center 8,000 miles away, but was equally troubled by Georgia's failure to recognize autism as a separate disability and the absence of an appropriate facility within the state. Due to concern over the choice of a Tokyo location, the court ordered Drew's parents to submit an itemized statement of the costs incurred in placing Drew in school in Tokyo and Boston. In the court's supplemental order of February 18, 1988, the district judge found that the school district should reimburse plaintiffs in the amount of $42,637.00 for the expenses they incurred in obtaining residential treatment for Drew and $8,500 for attorney's fees, amounts representing only part of what plaintiffs sought.

[6] The third issue the appellant raises is whether the trial court abused its discretion in requiring a residential placement until Drew reaches age twenty-one.

Appellant's argument appears to be based on the erroneous idea that the court ordered Drew's unconditional placement in a residential facility until the age of twenty-one. Rather, the court specifically required an annual IEP meeting in conformance with the EHA and provided that if Drew no longer needed residential placement the new IEP would control. (Order of February 18, 1988, Rl-37-4, 5). The court stated that if at the statutorily mandated yearly individualized educational program ("IEP") meetings the school district can demonstrate that Drew no longer needs residential placement, the court will not interfere with that decision.

[7] The fourth issue on appeal is whether the trial court's admission into evidence of records from the Tokyo school was reversible error. The Tokyo school records, even if improperly admitted, were merely cumulative of other evidence and therefore their admission was not reversible error. Appellant contends that admission of school records from the Tokyo school was reversible error because they were hearsay and lacked a foundation for authenticity. The court overruled the objection and admitted the documents as business records. Appellant contends this was error because the foundational requirements for such admission were not met. Even if the appellant is correct in this regard, it would appear to be harmless error, as these records merely added to other evidence that was properly admitted. The Tokyo school records merely documented Drew's progress at the school and the lack of progress on Drew's part. We conclude that the admission of the school records was not reversible error.

*Conclusion*

For the above reasons, the order of the district court is **AFFIRMED.**

(Filed October 3, 1989)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NOS. 88-8031, 88-8124

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IN RE: DREW P. By Next Friend,
Plaintiff-Appellee,

versus

CLARK COUNTY SCHOOL DISTRICT,
Defendant-Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

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**ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC**

(Opinion July 20, 1989, 11 Cir., 1989, ..... F.2d .....).
(October 3, 1989)

Before HATCHETT and CLARK, Circuit Judges, and HOEVELER,* District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of

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*Honorable William M. Hoeveler, U.S. District Judge for the Southern District of Florida, Sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

ORD-42

Supreme Court, U.S.
FILED
FEB 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-882

In The

# Supreme Court of the United States

October Term, 1989

CLARKE COUNTY SCHOOL DISTRICT,

*Petitioner,*

vs.

IN RE: DREW P. by next friend,

*Respondent.*

## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

B. ANDREW PRINCE
(next friend of Drew P.)
P.O. Box 229
Watkinsville, Georgia 30677
(404) 769-0752
*Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Does the Education for all Handicapped Children Act, 20 U.S.C. Sec. 1401 *et seq.*, require that a unilaterally selected private educational placement be a "free appropriate public education" in order for the parents of the handicapped child to be entitled to reimbursement for expenses.

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## I.

## STATUTORY PROVISIONS INVOLVED

(Note: The following are in addition to those STATUTORY PROVISIONS set out in the Petition.)

*34 CFR Sec. 300.1 (1988):* Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs.

*34 CFR Sec. 300.2(c) (1988): Private schools and facilities.* Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

*34 CFR Sec. 300.4 (1988):* Free appropriate public education. As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge,

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under Sec. 300.340-300.349 of Subpart C.

*34 CFR Sec. 300.341(b)(1) (1988):* State education agency responsibility.

*(b) Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency;

*34 CFR Sec. 300.347(a) (1988):* Private school placements.

*(a) Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with Sec. 300.343.

*34 CFR Sec. 300.400 (1988):* Applicability of Sec. 300.401-300.403.

Sections 300.401-300.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

*34 CFR Sec. 300.401 (1988):* Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under Sec. 300.340-300.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

*34 CFR Sec. 300.403 (1988):* Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Sec. 300.450-300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under Sec. 300.500-300.514 of Subpart E.

S. Rep. No. 94-168, p. 32 (1972): Furthermore, the Committee bill stipulates that special education and related services should be available to all children within the State as a matter of public responsibility. Thus, the bill requires that if a State or local educational agency has

placed or referred the child to a private school or to another school or facility inside or outside of the State or local jurisdiction because the State or local educational agency did not have an appropriate program for the child, then the State or local educational agency remains financially responsible for that child's education. The Committee points out that all provisions of the Act including those requiring due process protections, the provision of individualized planning conferences, and the provision of services in the least restrictive environment extend to children so served by a State or local educational agency. If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under section 614 (5) applies.

## II

## STATEMENT OF THE CASE

Respondent brought suit as next friend of his handicapped child, alleging that the Petitioner had failed to provide a free appropriate public education to the child, and sought a determination that only a residential placement in an autistic treatment facility would provide the

child with an appropriate education and seeking reimbursement for monies expended by Respondent in unilaterally having placed the child in such a private placement.

The evidence disclosed that prior to the child being unilaterally removed from the placement offered by Petitioner, he had become self destructive and was a danger not only to himself but to others. There had existed, for some years, a disagreement between the parents and the petitioner as to whether the child's disabling condition was retardation or autism. Since the Petitioner had maintained that the child was retarded and could be appropriately educated in its program for retarded children and since Respondent was aware of the financial risk involved, Respondent initially placed the child in an in-state residential facility for retarded persons. After a short period in this facility, Respondent was advised that the personnel there did not think the placement appropriate, since their opinion was that the child was autistic, and they recommended residential placement in an autistic treatment facility. The District Court, likewise, found this placement inappropriate and awarded no reimbursement for expenses connected therewith.

After a lengthy search, Respondent finally located a facility that would accept the child and which was a facility for the treatment of autistic children. There was no such facility within the state of Georgia, nor was there any such facility, that would or could accept the child, available at the time within the continental United States. The Petitioner did nothing by way of recommending residential programs, meeting state standards or otherwise. The placement chosen by Respondent was not only

the only one available and appropriate at that time, but was one where the costs involved were substantially less than the costs of other residential placements, even though none of those other placements could or would accept the child.

Neither the Petitioner, nor the Respondent, presented evidence to, nor was the issues of "state standards" presented for consideration to the District Court. Petitioner first raised this issue in its appeal from the adverse decision.

## III

## REASONS FOR NOT GRANTING THE WRIT

### A.) Question Presented Was Not Raised or Resolved in the District Court.

The question presented by Petitioner, regarding state standards and whether the placement for which reimbursement was ordered meet such standards or whether there were any such standards, was not raised before the District Court and this Court should not now entertain such issue.

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim vs. Miller*, 96 S. Ct. 1399 (1976). The general rule is that an appellate court does not consider an issue not passed on below. *Singleton vs. Wulff*, 96 S. Ct. 2868 (1976). Issues not raised in the district court cannot be considered by the appellate courts as a basis for reversal. *Morrow vs. Greyhound Lines Inc.*, 541 F.2d 713 (1976).

**B.) Question Presented Does Not Meet the Standard For The Grant of The Writ.**

**1.) Petitioner has erroneously interpreted the Education For All Handicapped Children Act, 20 U.S.C. Sec. 1401 *et seq.***

Petitioner implies that before reimbursement for private placement by the parents of a handicapped child can be ordered, the parents must prove that such a placement is "a free appropriate public education" as defined by the Education for All Handicapped Children Act, 20 U.S.C. Sec. 1401 *et seq.* (EHA).

As Petitioner concedes, "it cannot be seriously argued that reimbursement of parents for sums spent on private special education is not authorized under the EHA." (Petition p. 9). Petitioner contends, however, that before such reimbursement can be ordered, the parents must show that the private special education placement meets the standard of "a free appropriate public education", as defined by the EHA. They imply that the only remedy available "under the Act" is a "free appropriate public education". Neither the legislative history, nor the EHA, nor the regulations promulgated thereunder indicate such a result.

The legislative history indicated that Congress contemplated this very factual situation and provided in the EHA "that disagreement and the question of who remains financially responsible is a matter to which the due process procedures . . . " apply. S. Rep. No. 94-168, p. 32 (1975).

There is no doubt but that the regulations deal with this very situation. Not only do they provide that their purpose is to provide that each handicapped child *"referred to or placed in private schools and facilities by"* a *"public agency"*, has a *"free appropriate public education"* (34 CFR Sec. 300.2(2) and Sec. 300.1(a), they provide that in regards to such a placement, i.e. *by a public agency*, the placement must meet the definition of "free appropriate public education". 34 CFR Sec. 300.4.

Also, the regulations provide that the requirement of an individualized education program (I.E.P.) as required by the definition of "a free appropriate public education", are applicable only when a child *"Is placed in or referred to a private school or facility by a public agency;"* and that an I.E.P. is only required before *"a public agency places a handicapped child in, or refers a child to, a private school or facility"* (34 CFR, Sec. 300.341(b)(1) and Sec. 300.347(a)).

Likewise, the regulations provide that the requirement that a private school or facility meet "the standards that apply to State and legal educational agencies" (34 CFR Sec. 300.401(3)). " . . . apply only to handicapped children who are or have been placed in or referred to a private school or facility by a *public agency* . . . " (34 CFR Sec. 300.400).

The regulations specifically deal with the factual situation in this case when they provide that "Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures . . . " (34 CFR Sec. 300.403(b)). It is of importance to note the glaring lack of the phrase

"free appropriate public education", in this regulation and likewise in paragraph 2 of S. Rep. No. 94-168, p. 32 (1975).

The cases relied upon and cited by Petitioner can be reconciled with this case, since they generally deal with placements by a public agency or placement where the availability of other placements has not by either party been addressed.

**2.) Petitioner has erroneously interpreted the judicial decision regarding the EHA.**

This Court in *Burlington School Comm. v. Mass. Dept. of Ed.*, 471 U.S. 359. (1985), found that a handicapped child is entitled "to receive at public expenses specially designed instruction to meet his unique needs . . . " (*Burlington* at p. 361) and that forcing parents to leave a child in an "inappropriate placement" would violate the requirements of the EHA (*Burlington* at p. 360).

Such a *post hoc* determination of financial responsibility, as the District Court undertook in this case, was specifically authorized in *Burlington* (at p. 371). This Court recognized that the intent of the law was to give each handicapped child both an appropriate and free education, (*Burlington* at 372). Respondent submits that if *Burlington* has meaning the Petitioner's position cannot be sustained. If the only remedy available is for parents to unilaterally and at their expense to provide a placement that (1) has been provided at public expense, under public supervision and direction, and without charge, (2) meets the standards of the state educational agency, (3) includes an appropriate preschool, elementary, secondary

school *in* the State involved, and (4) are provided in conformity with the individualized education program, then this burden can never be met.

First a unilateral placement is never at public expense, as recognized in *Burlington*. Secondly, such a placement may or may not meet state standards. In this case, the issue of state standards, whether they existed and, if so, were meaningful or not was not addressed at the District Court level. As Respondent submitted to the Eleventh Circuit in response to Petitioner first raising the issue on state standards, Petitioner, through counsel, acknowledged on the record, in the District Court, as opposed to a mere allegation in Respondent's brief in the Eleventh Circuit, that the State of Georgia, and this Petitioner, does not even recognize autism as a separate disorder (R4-19; Respondent's Brief p. 18, Eleventh Circuit). It is not difficult to comprehend the logic used by Petitioner.

"If we don't recognize this particular handicapping condition, then we won't establish any state standards regarding private placement of children with this condition and thus will not have to pay reimbursement to parents who place their children privately". When one considers that the reason for private placement was, in the first instance, required since the public school placement was determined to be inappropriate because of the same failure to recognize autism and treat it accordingly, the fallacy of Petitioner's logic becomes obvious.

Thirdly, any out of state placement, would be precluded by the requirement of "*in* the State involved" in the definition of "free appropriate public education".

Likewise, there would never by an individualized education program, as contemplated and defined by the EHA, in an unilateral placement. Such a program is, by definition, required to be done by the local education agency, with parental input. In a unilateral placement, as in this case and as in *Burlington*, this could never be the case.

To hold that the EHA requires a parent to place a child privately only in a "state approved" school assumes that, as of the enactment of the EHA, every state had an approved private placement available for every handicapping condition. This was not, and is not, the case. The error of this assumption was pointedly acknowledged in *Hendrick Hudson Dist. Bd. of Ed. vs. Rowley*, 458 U.S. 176 (1981), at 191. Such an assumption would require finding that each state had an approved private school for each handicapped child in the wide spectrum of handicapped children and with all the infinite variations involved. (*Rowley* at 202).

## IV

## CONCLUSION

Respondent submits that this Court has no basis for the granting of the writ; that the decision below is in accord with the statutory authority and the judicial decisions of this and other courts and that no other reason exists for this Court to entertain such Petition.

Respectfully Submitted,

B. ANDREW PRINCE
(next friend of Drew P.)
Respondent

P.O. Box 229
Watkinsville, Georgia 30677
(404) 769-0752